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Supreme Court of the United States

October Term, 1965

No. 358

CHRISTOS VASSOS,

Petitioner,

against

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JACOB RASSNER,
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BArclay 7-2618

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Supreme Court of the United States

October Term, 1965

No. ————

—o—

CHRISTOS VASSOS,

Petitioner,

against

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York.

Opinions Below

The Trial Court did not render any opinion. The Appellate Division of the Supreme Court, First Department affirmed, without opinion, by order dated November 30, 1965, and denied leave to appeal to the Court of Appeals by order dated January 20, 1966.

The Court of Appeals for the State of New York denied leave to appeal by order dated March 24, 1966.

Jurisdiction of the Court

The jurisdiction of this Court is invoked pursuant to the authority of 28 U. S. C. 1257(3).

Statement of the Case

Petitioner was first examined in 1949 by Dr. Bozes, who, being uncertain of the diagnosis, referred petitioner to Dr. Ornstein, a chest specialist (A32, A33),* for examination.

Dr. Ornstein diagnosed the condition as diaphragmatic hernia (A32, A33, A34).

Petitioner consented to repair of a diaphragmatic hernia and nothing else (A33, A69-A70, A71-A72).

Petitioner did not have a herniated diaphragm (A37-A38, A38, A67).

Petitioner was mis-informed as to his condition and as to the nature and extent of the surgical intervention (A44, A45, A71).

Petitioner established through his Dr. George Simmons that petitioner had not been given pre-operative examination or information to which he was entitled and was not treated in accordance with the recognized standard of good practice, and that petitioner suffered deterioration of his respiratory condition as a result of malpractice (A35, A36, A37, A39).

Petitioner called as a witness Nicholas Gogonis, who was the interpreter of conversations between petitioner and Dr. Sarot and Dr. Ornstein. Said witness corroborated the substance of petitioner's testimony (A69 *et seq.*).

The genuineness of Exhibit I, the letter alleged to have been written by petitioner, the writing of which was denied by petitioner, was considered by the Court as presenting a question of law and not an issue of fact.

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* "A" refers to pages of Appellant's Appendix to Brief in Appellate Division. Numbers refer to folios in the Record.

The Trial Court at the close of petitioner's case, denied the motion to dismiss (A450) and, thereafter, upon respondents resting without offering any further testimony, dismissed the complaint (A467-8).

The Appellate Division of the Supreme Court, First Department, affirmed, without opinion, and the said Court, as well as the Court of Appeals of the State of New York, refused leave to appeal.

Reasons for Granting the Writ

Mindful of the fact that the United States Supreme Court will not consider the correctness of a non-federal ground upon which a State Court's decision rested unless, as in the case at bar, there was an obvious subterfuge to evade consideration of petitioner's constitutional right under both the United States and the State of New York Constitutions, we submit:

Patients' lives and well being are so often at the mercy of their doctors, and concealment of the nature and extent of surgical intervention and the results thereof are usually so exclusively within the control of the operating surgeon, that it is a denial of a citizen's constitutional right to due process of law to have a Trial Judge fix the date of the commencement of the statute of limitations, as a matter of law, instead of submitting such controversial factual issue for a jury's determination. The labelling of the controversial issues of fact as questions of law seems to be such erroneous procedure as to evade the well recognized applicable law, that controversial issues of fact must be submitted to a jury for its determination. *Radio Station WOW* v. *Johnson*, Neb. 1945, 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092, mandate conformed to 19 N. W. 2d 853, motion denied 66 S. Ct. 11.

The well settled law that it is the jury's province and not that of the Court's, to decide controversial issues of

fact, should not be overruled by the expediency of a Trial Judge labelling the evidence "incredible" and adopting such label as a basis for taking the decision of factual issues from the jury unto himself.

Jurisprudence is rendered a hodgepodge of bewilderment by the loose practice and light indulgence of this radical precept; which proclaims that a Trial Judge has the power of reversal of prior orders in the same case, as to the identical subject matter, after substantial testimony is presented at the trial supporting the factual matters which constituted the basis of the prior orders.

The Constitutional protection of a trial by jury is placed in jeopardy if Trial Courts are permitted the power of decision to deny such relief, irrespective of the verbiage or rationalization employed to justify the denial of due process of law, by the expediency of designating controversial issues of fact as questions of law.

Questions Presented

1. To what extent is a Trial Judge bound by prior holdings in his Court, in the same case, as to the precise question presented.

2. Does the arbitrary ruling, that testimony is not evidence without approbation by the Trial Judge as to its credibility, under circumstances where reasonable men might differ, constitute a denial of fairness requisite in the concept of due process of law guaranteed by the Constitution; and, does it not abortively deny recognition to and vindication of plainly vested legal rights so as to violate equal protection under the 14th Amendment.

Argument

Even the most able Judges of the highest integrity such as Trial Judge Hon. Arthur Markewich, may give way to their personal feelings and thereby with all good intentions encroach upon the province of a jury as to the decision of controversial factual issues.

Judge Markewich granted petitioner's counsel an opportunity to point out the Court's misapprehension of the evidence. The Court had no hesitancy to state that he had been under a misapprehension as to part of the evidence (447).

The Court summarized petitioner's position as follows (448):

> "—what is claimed here is a failure to advise the plaintiff of the exact nature of the operation, a failure to secure his permission to go ahead with the lobectomy, a claim that there was a lack of necessity for the lobectomy, a mis-diagnosis of a diaphragmatic hernia, and then neglectful care following the operation. That is it in a nutshell?"

Thereupon he held as follows (449, 450):

> "The Court: Well, on the plaintiff's case, regardless of what Dr. Sarot may have said, bearing (450) in mind that he is an adverse party and giving it the benefit of those inferences which are most favorable to the plaintiff, I am constrained on either the first or third cause action or both—it doesn't matter which—to deny your motion at this time, at the end of the plaintiff's case. And I do so."

The Court's personal feelings in the matter are demonstrated by the following (466, 467):

> "It appears affirmatively to me, or it would that an excellent job was done here. I say this: That if it weren't for the testimony of Mr. Haring, I wouldn't hesitate to sit as a Magistrate and commit this man

for perjury with respect to that letter, Exhibit I, and, Mr. Rassner, I want it to be distinctly understood that I know as a fact that you knew nothing about this letter, Exhibit I, and that it came to you in this trial like a blow in the face, and you are, of course, not to be held accountable in any way for what your client has done."

"But I don't see really how any responsible person could have found on the basis of this evidence that either Dr. Ornstein or Dr. Sarot, by negligent (467) malpractice or by affirmative malpractice, contributed in any way to this man's second operation."

The Court's denial of the motion to dismiss the complaint at the close of petitioner's case would seem to indicate that a prima facie cause of action had been presented, therefore, the fact that the respondents rested without offering any proof does not seem to constitute a legal basis for the Court overruling his prior decision denying the motion to dismiss.

As to the question of the controlling law of the case:

Three Supreme Court Judges held that there were questions of fact which precluded summary judgment or a dismissal of the complaint as a matter of law.

At the trial, the evidence encompassed every fact set forth in the affidavits which constituted the basis for the three prior decisions that questions of fact were present, and went further, as demonstrated by the following excerpts from the testimony.

Dr. Irving Sarot testified (15):

"(15) Q. After the operation what was your diagnosis? A. Pulmonary tuberculosis.
Q. Was that the full extent of the diagnosis? A. After the pathologist gave his report, yes."

Dr. Christ Bozes also testified that his diagnosis was tuberculosis (54).

Dr. Bozes testified that Dr. George G. Ornstein's diagnosis was incorrect. He said it was "a diaphragmatic hernia" (31):

> "And, I tell you, quite frankly, Dr. Ornstein's impression was this patient had a diaphragmatic hernia. There is no question that was his impression. In other words, that there had been a rupture through the stomach into the thorax on the left side. And he recommended that surgery be undertaken to cure this man."

Dr. George Simmons testified (55):

> "Q. What was the diagnosis that he said? A. Probably diaphragmatic hernia.
> Q. Did you agree with that? A. No, because I had other opinions, that's why I gave it to him."

Dr. Simmons testified on the basis of various exhibits, including x-ray findings, that there was no basis for surgical intervention.

He further testified that diagnostic tests should have been made and on the determination that there was tuberculosis, to administer medically including the administration of antimicrobial therapy (99, 100) and not by surgical intervention.

Dr. Simmons further testified (102, 113, 114):

> "Q. Doctor, was there a definite course of treatment indicated on the basis of those letters; just yes or no?
>
> * * *
>
> Q. Just yes or no, Doctor. A. Obviously yes, it is a question of arriving at a diagnosis.
> Q. Tell us what it was. What treatment was indicated on the basis of those letters? A. Tomography, bronchoscopy, and sputum examination.
> Q. What about surgery? A. There is no surgery.
> Q. What do you mean by that, 'There is no surgery'? A. I mean, you can't just—particularly

1949, you just don't cut a part of the lung because you find a hole."

* * *

"Q. Now, Doctor, in so far as the exhibits which you have read and explained, on any of them or all together, or any of them taken together, was there any indication of surgical intervention? (114) A. Not in my opinion, sir; no.

Q. Was there any indication in any of them of the presence of a herniated diaphragm? A. No, sir, I haven't seen them."

On January 10, 1950, the pre-operative diagnosis was diaphragmatic hernia left (116).

There was no diagnosis of tuberculosis by respondents prior to the surgical intervention (119, 120).

It was admitted that the diagnosis of tuberculosis was first made at the operating table and that before that, the only diagnosis made was herniated diaphragm (263).

The hospital records shows there was no diaphragmatic hernia (117, 120).

No pre-operative differential diagnosis as required by good medical practice was made (150, 151).

Petitioner was never consulted by anyone and never gave authority for surgical intervention for a tubercular condition (151).

Petitioner was told specifically that his only ailment was a diaphragmatic hernia (164), and that the operation would cure him and enable him to go back to work in one month (167).

Petitioner was misinformed as to the nature of the surgery. He testified as follows (172):

"Q. And give us the exact conversation as near as you can remember what was said. A. I was told that the diaphragmatic hernia was repaired and it

was necessary to remove the lower lobe of the left lung because it was damaged by the accident."

• • •

"Q. Did he ever tell you that the left lower lobe was removed because of tuberculosis? A. No."

Vassos' testimony is unequivocal proof that the statute of limitations did not commence to run until 1960 when a certain letter written by Dr. Ornstein to petitioner's attorney as to a collateral matter was called to his attention (179, 180, 181, 182).

This was the first knowledge that petitioner had that his left lower lobe had been tubercular (181, 182, 200, 201), and that he had been misinformed and misled by Dr. Sarot and Dr. Ornstein.

The interviews by petitioner with Dr. Sarot and Dr. Ornstein were through an interpreter, Nicholas Gogonis, whose testimony specifically corroborated all of petitioner's testimony (205, 300, 301, 302, 303).

The Court in referring to Exhibit H, stated as follows (331):

"—Even when the plaintiff admitted, without equivocation that the signature on Exhibit I was his, still, as at the end of the plaintiff's case, assuming that the plaintiff had rested right then, in view of his testimony that he did not know, et cetera, I would have then denied a motion to dismiss."

The testimony by Christos Vassos was that he didn't write the letter and that it was not his handwriting.

A Vital and Reversible Error

Insofar as the date of the alleged writing of the letter was of basic importance, it was error for the Court to decide this question of fact instead of submitting it to the jury's consideration.

The Court took the following erroneous view (227, 228):

> "The Court: Now, look, Mr. Vassos, I have no interest in the outcome of this lawsuit one way or the other. It is immaterial to me who wins or who loses, but I do have a job to see that justice is done and I particularly have a job to see that people tell the truth on the witness stand, because the law requires certain specific action on my part if I believe that somebody is deliberately telling a falsehood.
>
> (228) Now, I have looked at the signature and I have compared it with the signature that is on the letter that you admitted writing. In my opinion, the handwriting is the same."

This, in spite of petitioner's positive denial of the letter as being his, and the testimony of one of the leading authorities in the world on handwriting, J. Howard Haring, corroborating Vassos' testimony (389, 390).

The Court stated (462):

> "I am ignoring the testimony given by Mr. Haring. I am saying it is of no consequence whether it goes one way or another."

Defendants' Exhibit I, alleged to have been written by Vassos, which he denied, is clearly the product of a trained medical mind and not that of an average seaman, such as Christos Vassos, and the letter by Dr. Lawrence Lercher, admitted into evidence on counsel's consent, solely to obviate the need of calling Dr. Lercher to the stand, but not conceding the truth thereof, is clearly a self serving letter to which reference had never been made in any of the three prior motions claiming that the action was time barred by reason of the statute of limitations.

The subsequent deterioration of petitioner's respiratory condition by surgical intervention, which was contra-indicated, was established by petitioner's expert (126, 127).

It is respectfully submitted that the power of a Trial Court to deny a trial by jury by the expediency of calling

testimony not evidence, is a dangerous, contrary and negative concept wherein the emotional impact of a Trial Judge albeit, learned and of unquestionable integrity, may nevertheless unconsciously and very materially overlook and obscure the facts, as indicated by the fact that the Trial Court did not recall the most vital and basic evidence heretofore pointed out, and this resulted in a miscarriage of justice.

An Appellate Court receiving a brilliantly edited summary of the alleged testimony would ordinarily be loathe to reverse a Trial Court's finding that the testimony was such that it did not constitute evidence, and only by limiting the power of a Trial Judge, in this regard, is a citizen assured that a jury and not Trial or Appellate Judges will pass upon the question of credibleness of testimony as to controversial issues of fact.

The Law

Petitioner was entitled to have the jury consider all of the facts received in evidence.

> *Matter of Phinn* v. *Kross,* 8 A. D. 2d 132, 135, 186 N. Y. S. 2d 469, 472, cited with approval in the case of *Gersh* v. *Village of Tuckahoe,* 260 N. Y. S. 2d 75 (May 24, 1965).

The failure of a doctor to make an adequate and proper disclosure to petitioner and leave to his decision whether or not surgical intervention should be resorted to constitutes a basis for liability.

> *Natanson* v. *Kline,* 186 Kan. 393, 350 P. 2d 1093, rehearing denied, 187 Kan. 186, 354 P. 2d 670;
> *Mitchell* v. *Robinson,* 334 S. W. 2d 11 (Missouri), cited with approval in the case of *Dirosse* v. *Wein,* 261 N. Y. S. 2d 623 (June 28, 1965);
> *Wolf* v. *Wolf,* 263 N. Y. S. 2d 195 (June 30, 1965).

Appellant was entitled to a trial of the issues involved, not to be denied his day in Court on the merits on the basis of the Court's interpretation of the evidence as being incredible.

Falcone v. *Falcone,* 263 N. Y. S. 2d 768 (Oct. 21, 1965);

New York Life Ins. Co. v. *H. & J. Guttag Corp.,* 265 N. Y. 292, 297, 192 N. E. 481, 482, cited with approval in *Gelrod* v. *Levine,* 263 N. Y. S. 2d 795 (Oct. 28, 1965).

There was more than ample evidence presenting substantial controversial issues of fact which do not come within the concept of questions of law. Accordingly, it was error for the Court to take unto itself and away from the jury the decision of the questions of fact by calling the same "questions of law".

Vide Farano v. *Stephanelli,* 7 A. D. 2d 420, 183 N. Y. S. 2d 707;

Vide Small v. *Kronstat,* 175 Misc. 626, 24 N. Y. S. 2d 535;

Moen v. *Thompson,* 186 Misc. 647, 61 N. Y. S. 2d 257;

Civil Practice Act, Section 111, promulgated in part by CPLR 3017(a);

Sterling Nat. B. & T. Co. of N. Y. v. *Merchants Bank,* 264 N. Y. S. 2d 271 (Oct. 28, 1965).

It is not the province of a Trial Court to decide what evidence is true or otherwise.

Travel House of Buffalo, Inc. v. *Grzechowiak,* 266 N. Y. S. 2d 925 (Jan. 20, 1966).

Petitioner was denied his basic right to be informed as to the true nature of his illness and the treatment indicated.

Krusilla v. *U. S.*, 287 F. 2d 34 (2d Cir. 1961);
Welch v. *Frisbie Mem. Hosp.*, 90 N. H. 337, 9 A. 2d 761 (1939).

Failure to render post-operative instruction, as well as failure to inform a patient as to his true physical condition so as to prevent deterioration is a basis for liability.

Tvedt v. *Haugen*, 70 N. D. 338, 294 N. W. 183 (1940);
Baldor v. *Rogers*, 81 So. 2d 658 (Fla. 1955) 55 A. L. R. 2d 453;
Lester v. *Aetna Cas. & Surety*, 1957, 240 F. 2d 676, cert. denied, 77 S. Ct. 1383, 354 U. S. 923, 1 L. Ed. 2d 1437;
Mitchell v. *Robinson*, 334 S. W. 2d 11 (Sup. Ct. of Missouri, Division No. 2, April 11, 1960).

CONCLUSION

For the reasons stated the petitioner respectfully prays that the writ of certiorari be granted.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

APPENDIX

Order of Affirmance on Appeal From Order and Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 30th day of November, 1965.

Present:

HON. BENJAMIN J. RABIN,
Justice Presiding.
" JAMES B. M. MCNALLY,
" HAROLD A. STEVENS,
" SAMUEL W. EAGER,
" G. ROBERT WITMER,
Justices.

9515

CHRISTOS VASSOS,
Plaintiff-Appellant,

vs.

CLAIRE ORNSTEIN, as Executrix of the Estate of George G. Ornstein, deceased, and IRWIN SAROT,
Defendants-Respondents.

Appeals having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County, entered on the 19th day of May, 1964, granting defendants' motions to dismiss the complaint, and from the judgment entered in the office of the Clerk of the County of New York on the 12th day of August, 1964, and said appeals

Order of Affirmance on Appeal From Order and Judgment

having been argued by Mr. Jacob Rassner of counsel for the appellant, and by Mr. Donald J. Fager of counsel for the respondent Claire Ornstein and by Mr. Thomas Grimes of counsel for the respondent Irving Sarot, and due deliberation having been had thereon,

It is hereby unanimously ordered and adjudged that the order and judgment so appealed from be and the same are hereby, in all things, affirmed; and that the respondents recover of the appellant $50 costs of this appeal.

Enter:

HYMAN W. GAMSO,
Clerk.

Order Denying Motion for Leave to Appeal

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-fourth day of March A. D. 1966.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

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1 Mo. No. 297

CHRISTOS VASSOS,

Appellant,

vs.

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

GEORGE KIMBALL,
Deputy Clerk.

(SEAL)

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Supreme Court of the United States

October Term, 1966

No. 358

CHRISTOS VASSOS,

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against

CLAIRE ORNSTEIN, as Executrix of the Estate of GEORGE G. ORNSTEIN, deceased, and IRVING SAROT,

Respondents.

BRIEF OF RESPONDENT ORNSTEIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Supreme Court of the United States

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Respondents.

BRIEF OF RESPONDENT ORNSTEIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement of the Case

The Petitioner, Christos Vassos, first saw Dr. Christ Bozes, on November 9, 1949. Shortly thereafter, Dr. Bozes had Mr. Vassos admitted as a patient to the Medical Arts Center Hospital for observation (RA–1). While at the hospital certain X-rays were done and diagnostic tests were carried out. In particular, sputum tests were carried out with reference to the question of possible tuberculosis, but those tests were negative (RA–8, RA–9). The doctor who read the X-rays of the chest, mentioned in his report the possibility of diaphragmatic hernia (RA–11). Because Dr. Bozes was uncertain about a diagnosis, he decided to call into consultation a specialist in diseases of the chest. Accordingly, the consulted Dr. George G. Ornstein who was one of the best chest physicians in the country (A–2). Dr. Ornstein saw the patient at the hospital and then suggested that he see the patient again in his office after discharge from the hospital because he was not sure about the diagnosis either (RA–12).

Thereafter, the patient was seen by Dr. Ornstein at his office and additional X-rays were taken. Subsequently, Dr. Ornstein made a diagnosis of diaphragmatic hernia, and suggested that the patient be operated on by Dr. Irving Sarot, a well-known surgeon (RA–18, RA–19).

Dr. Sarot first saw the patient at his office on January 7, 1950. He admitted the patient to Mt. Sinai Hospital for surgery. Dr. Sarot ordered an X-ray of the esophagus and then advised the patient that he had a condition which might be a diaphragmatic hernia or it might be an inflammatory lesion in the left lower lobe. He further advised the patient that since the surgical approach was the same for both conditions and since in 1949 there was no treatment which was adequate for tension cavities, that the chest surgery would be performed in an attempt to correct whatever defect was found on operation (RA–129).

At the time of the operation, Dr. Sarot did not find any evidence of a diaphragmatic hernia. However, he did find a cavity in the left lower lobe indicating a condition of tuberculosis (RA–138) and proceeded to remove the left lower lobe. Dr. Ornstein was not present at the operation and had nothing to do with the decision made at the time of surgery by Dr. Sarot.

Christos Vassos saw Dr. Ornstein on only two occasions: the second and last occasion was December 27, 1949 at Dr. Ornstein's Office (RA–73). This action was not commenced until almost 11 years later or in the month of August, 1960 (RA–244).

This action was tried before Justice Arthur Markewich and a Jury at a Trial Term of the Supreme Court, New York County. At the close of all the evidence, motions for judgment in their behalf were made by the Respondents Ornstein and Sarot. The Court granted the motions pursuant to Section 4401 of the Civil Practice Law and Rules

on the basis of Respondents affirmative defense that the action was barred by the Statute of Limitations.

Thereafter, the Appellate Division of the Supreme Court of the State of New York unanimously affirmed the decision below.

Then the Court of Appeals denied the Petitioner's motion for leave to appeal.

The Petitioner now claims that he has been deprived of his constitutional rights and seeks to be heard by this Honorable Court.

It is the position of the Respondent Ornstein that there is no constitutional question involved in this case and the petition for a writ of certiorari should be denied.

Questions Presented

1. Was the Petitioner deprived of his constitutional rights by reason of the fact that the Trial Court directed a verdict for the Respondents and did not submit the case to the jury?

2. Was there any question of fact to be submitted to the jury with respect to the Respondent Ornstein's affirmative defense of the Statute of Limitations?

3. Was there any questions of fact to be submitted to the jury as to whether or not Dr. Ornstein departed from proper and approved practices in his treatment of the Petitioner?